Director of Central Intelligence
THRU : Advisory Council
General Counsel

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Amendment of Communications Act.

The Special Legal Consultant to the Secretary of Defense wrote the Director of Central Intelligence on 24 November 1947 requesting his comments on the draft of a Bill "to amend Section 605 of the Communications Act of 1934 in order to increase the security of the United States and for other purposes." In addition, he enclosed the comments of the Attorney General and the Federal Communications Commission on this proposed legislation. The comments requested from the Director fall into two categories: first, the necessity and desirability of this legislation together with the best tactical approach to secure its passage; and, second, the legal aspects, in the light of the remarks of the Attorney General and the Communications Commission.

I

Section 605 of the Communications Act of 1934 prohibits unauthorized interception, divulgence or use of wire or radio communications of a private nature and prohibits the use of information so obtained; in addition, it forbids the unauthorized divulgence of the existence of the contents of such private communications. In brief, therefore, this section prohibits wire-tapping, or the use of information gained thereby, and renders it impossible for organizations, such as telephone and telegraph companies, to divulge to unauthorized persons the contents of any messages transmitted through their facilities.

The operation of an effective communications intelligence system can be effected in two ways: By the monitoring of radio transmissions, and by obtaining the text of transmissions either at the office of origin or at the office of receipt. If it is accepted that Section 605 of the Communications Act prohibits obtaining any traffic from the Communications Companies, amendments are vitally necessary in the public interest and in the interest of our national security.

The only way in which it is possible to secure the transmissions of foreign governments for purposes of communications intelligence, if such messages are transmitted by wire or cable, is by having the cable companies make a copy of the message available to authorized officials. If an amendment permitting this is adopted,

it will clarify the government's right to obtain this vitally necessary cable traffic and thus will eliminate the necessity for much of the monitoring of foreign transmissions which are sent by radio, thus resulting in a saving per annum of millions of dollars. It should, therefore, be strongly argued in support of the amendment that its result would be a vast saving to the government in a vital field of our national security

II

In order for there to be any chance for successful adoption by the Congress of an amendment to Section 605, we believe it necessary to make forceful presentation of the fact that it in no way will interfere with American civil liberties. The moment this measure is introduced, it will be greeted, regardless of its text, by criticism that it violates civil liberties. Unless it can be proved very quickly that such is not the case there is little possibility of its passage. As pointed out in the opinion of the Federal Communications Commission in their letter of 15 October 1947:

> "On numerous occasions since enactment of Section 605 . . . legislation has been proposed under which limited wire-tapping and interception of radio communication by law enforcement officers would have been authorized . . . None of these proposals were enacted, . . . It is thus clear that there may be greve question whether conditions have so changed as to require adoption of a policy for the cases covered by the proposed amendments directly contrary to that which has prevailed until now, and having so obviously serious an impact upon basic civil liberties now protected by law."

This opinion from the Commission, however, is based largely upon the thought that what is proposed is a special exemption from the provisions against wire-tapping. Because it is highly improbable that any relaxation of the wire-tapping provisions could be obtained, any proposed legislation should completely steer away from that subject.

The interest of the Central Intelligence Agency in this legislation is restricted merely to the securing of information originating outside the United States, or being sent by foreigners to other foreign countries or to this country, for the jurisdiction of this Agency is solely in the field of foreign intelligence. Perhaps the F.B.I. has a different attitude and wishes to extend the exception to permit internal interception, but we feel that the Central Intelligence Agency should restrict its comments to our field of interest alone.

This becomes an important distinction in view of the fact that in its letter, the Federal Communications Commission depends

largely upon the United States Supreme Court opinion in the case of Nardone v. U. S., 302 U. S. (1937).

The Nardone case stands for the proposition that Section 605 forbids both unauthorized interception of a message by wire-tapping, or the unauthorized divulgence of the message or its substance to any person. It was urged that the prohibition against wire-tapping excluded Federal agents

> "since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime."

However, the Court felt that the Congress might have considered it less important that some offenders should go unpunished

> "than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

It was the court's conclusion that the practice of wire-tapping to obtain evidence involved a grave and moral wrong.

In the language of the Nardone case quoted above, and the subsequent cases which have followed this decision, stress has been layed on the ban against wire-tapping, even by law enforcement officials, because it is considered a rather sinister violation of the long established civil liberties of American citizens. We feel it is because this concept is so deep-rooted, that it would be unwise, at this time, to advocate legislation which would permit wire-tapping, no matter how limited or safeguarded. Certainly, in view of the attacks upon the Central Intelligence Agency within the past year as an incipient Gestapo, it would be politically unwise for this Agency to advocate a relaxation of Section 605 insofar as wire-tapping is concerned.

It is felt that with the elimination of the wire-tapping provision, this Agency can heartily endorse methods which would make available to American intelligence services, radio, wire, and cable transmissions of foreign governments and persons. We feel that such action would be outside the interdictions of the Nardone case and related opinions for two reasons. First, no violations of the civil liberties of American citizens would take place. Second, we are not attempting to solve crimes which may affect one person or a few people, but are engaged in operations, the successful completion of which might well involve the entire national security of this country and all of its citizens, and make the difference between peace and war.

III

There is some reason to believe that the government is not barred by statute from monitoring foreign radio transmissions, both

of a public and private nature, and, in fact, may require that the cable companies turn over the texts of certain messages to a designated agency without any further specific statutory authority. This is based upon the canon of construction that a sovereign is presumptively not intended to be bound by its own statutes unless named therein. The point that the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the Act was strongly urged in the Nardone case. The Court pointed out that this canon applied in two types of cases:

> "The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest . . . The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself.
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> "The second class -- that where public officers are impliedly excluded from language embracing all persons -- is where a reading which would include such officers would work obvious absurdity . . ."

The Court felt that the facts in the Nardone case did not place it within these two classes, due to an over-riding principle

> "that the sovereign is embraced by general words of a statute intended to prevent injury and wrong."

Thus, it is apparent that the majority of the Court in this case were so absorbed with the problem of violation of civil liberties by wire-tapping that they over-rode all other considerations and principles. In a dissenting opinion in the Nardone case, two Justices pointed out that the word "person" used in Section 605 should not include a Federal officer actually engaged in crime detection and the enforcement of the criminal statutes. The dissent stated, that

> "the word 'person' used in this statute does not include an officer of the federal government, actually engaged in the detection of crime and the enforcement of the criminal statutes of the United States . . . If Congress thus intended to tie the hands of the government in its effort to protect the people against lawlessness of the most serious character, it would have said so in a more definite way than by the use of the ambiguous word 'person' . . . For that word has sometimes been construed to include the government and its officials, and sometimes not . . .
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> "There is a manifest difference between the case of a private individual who intercepts a message from motives of curiosity or to further personal ends, and that of a

> responsible official engaged in the governmental duty of uncovering crime and bringing criminals to justice. It is fair to conclude that the word 'person' as here used was intended to include the former but not the latter."

In a more recent case, United States v. Cooper Corporation, 312 U. S. 600 (1941), the question was again raised as to whether the word "person" includes the sovereign when used in a statute. In that case, the government attempted to bring suit under Section 7 of the Sherman Anti-trust Law. Section 7 provided that "any person" might sue for treble damages under certain conditions. The question arose as to whether the government was "any person" within the meaning of the statute. The Court pointed out that in common usage the term "person" does not include the sovereign and that statutes employing the phrase "person" are ordinarily construed to exclude the sovereign. Citing the Wardone case, the Court indicated that while there was no hard and fast rule, certain aids to construction should be used to determine whether it was intended to include the sovereign in a given case. These aids are the purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute. In the Cooper Corporation case, the Supreme Court determined that the use of the phrase "any person" did not include the sovereign, stating that

> "Without going beyond the words of the section, the use of the phrase 'any person' is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States, 'the ordinary dignities of speech would have led' to its mention by name."

In the most recent case of United States v. United Mine Workers of America, 67 S.Ct. 677 (1947), the question of the applicability of the Norris-LaGuardia Act was raised. Speaking for the Court, Mr. Chief Justice Vinson stated that

> "There is an old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of the construction only. Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one, and the statement of the rule in those cases has been so explicit, that we are inclined to give it much weight here. Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific (language) to that effect' if it actually intended to reach the Government in all cases."

It was held, therefore, that the Norris-LaGuardia Act did not apply to the government.

If one considers the language of the United Mine Workers case, quoted above, it might be a fair assumption that the present Court might hold that Section 605 of the Communications Act does not apply to the Federal government. If it should follow the Nardone case it would, in all probability, do so only in the narrow instance of wire-tapping due to the problem of civil liberties. As pointed out in Section II above, however, the question of civil liberties should not arise in our proposed legislation as the rights of American citizens are not at stake.

If one follows the construction aids of the Cooper Corporation case one would find that the major purpose of the Communications Act, in the words of the Nardone decision,

> "was the transfer of jurisdiction over wire and radio communication to the newly constituted Federal Communications Commission."

The purpose and subject matter were basically to re-enact the provisions of the Radio Act of 1927 so as to make it applicable to wire messages. A virtually identical provision to Section 605 appeared in the Radio Act of 1927, under which the decision in the case of Olmstead v. U. S., 277, U. S. 438, held that evidence secured by wire-tapping was admissable at common law despite the fact that a state statute made wire-tapping a crime. The Court in the Nardone case points out that "we are without contemporary legislative history relevant to the passage of the statute in question." Therefore, in considering Section 605 we are without the construction aid of legislative history. The executive interpretation of the statute was obviously that appropriate Federal authorities should be allowed to tap wires for the detection of crime. Thus it is necessary to emphasize again the fact that Section 605 was deemed to include the government only because of the problem of civil liberties, and that this is not a question which should arise under the proposed amendments if they are properly framed.

A further point should be mentioned, that Article 26 of the International Telecommunication Convention of Madrid (1932), to which the United States became a party signatory in 1934, specifically reserves to the contracting governments the right to stop the transmission of any private telegram or radio-telegram or telephone communication which might appear dangerous to the safety of the state. The International Telecommunication Convention signed at Atlantic City, New Jersey on 2 October 1947, which will abrogate and replace all prior conventions when ratified, contains the following language in Article 29:

> "1. Members and Associate Members reserve the right to stop the transmission of any private telegram which may

appear dangerous to the security of the state or contrary to their laws, to public order or to decency, provided that they immediately notify the office of origin of the stoppage of any such telegram or any part thereof, except when such notification may appear dangerous to the security of the state.

"2. Members and Associate Members also reserve the right to cut off any private telephone or telegraph communication which may appear dangerous to the security of the state or contrary to their laws, to public order or to decency."

Article 32 on Secrecy of Telecommunications further provides:

"1. Members and Associate Members agree to take all possible measures, compatible with the system of telecommunication used, with a view to ensuring the secrecy of international correspondence.

"2. Nevertheless, they reserve the right to communicate such correspondence to the competent authorities, in order to ensure the application of their internal laws or the execution of international conventions to which they are parties."

These provisions clearly presuppose that all communicated information is available to government agencies. Possibly the language in Article 40 of the 1947 Convention has further bearing on this question:

"Members and Associate Members reserve for themselves, for the private operating agencies recognized by them and for other agencies duly authorized to do so, the right to make special arrangements on telecommunication matters which do not concern Members and Associate Members in general. Such arrangements, however, shall not be in conflict with the terms of this Convention or of the Regulations annexed thereto, so far as concerns the harmful interference which their operation might be likely to cause to the radio services of other countries."

IV

Reference is made to the letter dated 23 June 1947, to the Director of the Bureau of the Budget, Mr. James E. Webb, from Mr. Douglas W. McGregor, The Assistant to the Attorney General. In it a proposed statutory text is suggested which will amend Section 605 in the interest of national security, by granting exceptions to this section to the Military Intelligence Division of the Department of the Army, the Office of Naval Intelligence, and the

Federal Bureau of Investigation. Insofar as this proposal would permit these agencies, and particularly the F.B.I., to engage in wire-tapping it will run into the legislative difficulties indicated above. If its purpose is to assist communication intelligence, then it might be well to re-phrase it to limit it to messages from foreign sources. If such a suggestion is adopted, the Federal Bureau of Investigation should be dropped from the text and the Central Intelligence Agency added. This would also solve any future problems which might arise in connection with the monitoring activities of the Foreign Broadcast Information Branch.

It is felt, however, insofar as the Central Intelligence Agency is concerned, that a preferable text would include an appropriate definition of "foreign government" (such as is included in the Navy-sponsored S-1019) and would also contain language to safeguard the telecommunication companies.

A desirable text would read substantially as follows:

"Provided further, That in the interest of national security, this section shall not apply to the interception, receipt, or utilization by, or the furnishing to a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States, of the contents of any communication, by wire or radio, of any foreign government.

"The term 'foreign government' as used herein shall be construed to include in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States."